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# COURT-CONNECTED ADR—A TIME OF CRISIS, A TIME OF CHANGE

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## I. INTRODUCTION

Court-connected alternative dispute resolution (court ADR)—ADR programs organized, funded, run, or endorsed by the courts—has come a long way since it first emerged in the 1970s. However, court ADR still faces some major challenges; the primary challenge is the lack of institutional support—both financially and policy-wise—needed to run high-quality court ADR programs that, to borrow from Professor Lawrence Susskind, are not just “efficient” but also lead to “wise,” “fair,” and “stable” results.<sup>1</sup>

One of the main reasons for the lack of institutional support stems from the fact that the courts have not fully embraced what ADR was meant to offer: efficient and effective conflict resolution processes that do not compromise, and perhaps even enhance, perceptions and experiences of fairness and justice.<sup>2</sup> Instead, court ADR appears to

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1. See Panel Discussion, *Core Values of Dispute Resolution: Is Neutrality Necessary?*, 95 MARQ. L. REV. 805, 816 (2012) (statements of Professor Susskind).

2. As stated by the Honorable A. Leon Higginbotham,

By all means let us reform that process, let us make it more swift, more efficient, and less expensive, but above all let us make it more just. . . . Let us not, in our zeal to reform our process, make the powerless into victims who can secure relief neither in the court nor anywhere else.

See Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking:*

focus more and more on “efficiency for the sake of efficiency.”<sup>3</sup> Efficiency, however, cannot and should not be the only focus of court ADR programs; because courts fund and authorize ADR programs as well as mandate parties to participate in them, they are also responsible for ensuring the quality of court ADR programs.

Over the past thirty-five to forty years, there have been a number of parallel efforts to establish court ADR programs within various legal contexts—efforts that have produced, and continue to produce, a wide and rich body of knowledge about ADR. Although much progress has been made, these efforts tend to be somewhat fragmented—courts, ADR professionals, and scholars that work in the family context have often followed one trajectory, while those who operate in the broader civil context followed others. Moreover, there is divergence in the types of challenges being faced and innovations put forth even within individual substantive areas of law where ADR is practiced. Along with these differences, there are also multiple areas of overlap and there is potential for cross-enrichment. Due to the existing challenges to court ADR—which are significantly enhanced by the current financial downturn’s impact on courts’ budgets and ADR programs, the rise in pro se litigants and high conflict, and the proliferation of non-English speaking litigants—there is an urgent need for proponents of court ADR to join forces, share the lessons learned so far, and articulate a clear vision for the future of court ADR.

With these challenges and needs in mind, the Association of Family and Conciliation Courts (AFCC), Marquette University Law School, and Resolution System Institute (RSI) convened this conference (entitled *The Future of Court ADR: Mediation and Beyond* and hosted by the Marquette University Law School) to examine the status of court ADR programs in the general civil context<sup>4</sup> and in the specific family

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*Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399, 403 (2005) (alteration in original) (quoting A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 87, 110 (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter POUND PROCEEDINGS]).

3. McAdoo & Welsh, *supra* note 2, at 404 (quoting POUND PROCEEDINGS, *supra* note 2, at 300).

4. Civil court ADR refers to a wide range of substantive areas of law other than family law, such as employment, housing, foreclosure, bankruptcy, small claims, general torts, and contract disputes.

context (family ADR).<sup>5</sup> The overall goal of the conference was to start shaping an agenda for the future of family and civil court ADR. Particular emphasis was placed on examining new ADR and case-management options as they relate to the use of the mediation process.

The conference, convened over two days and in two parts, gathered leading ADR scholars and practitioners from the family and civil ADR contexts. The discussions were designed to encourage cross-learning between the family ADR and the broader ADR communities. The first day started by revisiting and expanding upon the classic 1981 debate between Professors Lawrence Susskind and Joseph Stulburg over the core values of mediation—mainly self-determination, impartiality, and fairness—and the interplay between them, while adding in the family perspective and placing the debate in the present context.<sup>6</sup> This session then shifted to considering the potential roles of ADR interveners that may not conform with the classic mediation definition of the third-party intervener. Following this initial framing session, titled *Core Values of Dispute Resolution—Is Neutrality Necessary?*, the conference highlighted some of the perspectives and key considerations of ADR stakeholders: judges, lawyers, ADR practitioners, and various categories of parties impacted by ADR programs. The first day of the conference then progressed to an examination of innovative ADR processes as well as multi-intervention ADR systems.<sup>7</sup>

During the second day, the participants were divided into groups that discussed a (non-exhaustive) list of five topics that were identified by the conference participants as central to the future of ADR.<sup>8</sup> Each

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5. For a full description of the conference and for other related resources, please visit THE FUTURE OF COURT ADR: MEDIATION AND BEYOND, <http://law.marquette.edu/courtadr/> (last visited May 4, 2012).

6. For the original debate, compare Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981), with Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981). Professors Susskind and Stulberg were present at the opening plenary session, along with Dr. Bernard Mayer, as the third panelist, and Professor John Lande, as the moderator. See Panel Discussion, *supra* note 1.

7. The term “system” as used here and throughout the Report is defined as “one or more internal processes that have been adopted to prevent, manage or resolve a stream of disputes.” See Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 126 (2009) (footnote omitted).

8. The five topics were (1) discussion among public policy mediators regarding the design of a process to develop, reform, or enhance services in family disputes; (2) the impact

group came up with a number of important suggestions about its particular topic. The goal of the second day of the conference was to begin outlining, in practical terms, what efforts need to be undertaken to support and promote the implementation of innovative ADR systems.

This Report contains specific conclusions and recommendations, most made by the participants themselves and others derived from the discussions that took place before, during, and after the conference.<sup>9</sup> Part II of the Report will provide a brief background of court ADR and will outline some of the challenges faced by it. Part III will explore the principles and goals of mediation and some of the central challenges to the achievement of these aspirational goals within the context of court-connected mediation programs. Part IV will move beyond mediation and turn to other ADR processes, looking at specific interventions discussed in detail in the conference: Early Neutral Evaluation (ENE), which is practiced both in the family and general civil contexts, and Parenting Coordination (PC), which is practiced in the family context only. Part V will examine how ADR interventions may be offered within a multi-intervention ADR system: the tiered and triage approaches. Part VI will summarize some of key considerations raised by the conference attendees that are viewed as central to the future of ADR. Part VII will outline some suggestions made by conference attendees for promoting well designed and supported ADR programs. Finally, Part VIII will briefly conclude the Report.

## II. COURT ADR: BACKGROUND AND CHALLENGES

The emergence of court ADR is often traced to the Pound Conference, where Professor Frank Sander posited that cases should be

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of socioeconomic status on ADR services; (3) self-represented and unrepresented litigants; (4) strategies for developing champions of the court system; and (5) the vision of court ADR in 2030. See Reporter's Notes, Marquette University Law School Symposium on The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (on file with author) [hereinafter Reporter's Notes].

9. The conference included recommended readings both from the family and broader civil context, many authored by presenters at the conference. See *Recommended Reading List*, THE FUTURE OF COURT ADR: MEDIATION AND BEYOND, [http://law.marquette.edu/courtadr/?page\\_id=139](http://law.marquette.edu/courtadr/?page_id=139) (last visited Apr. 2, 2012). This Report draws most of its sources from these readings, intertwining them with the presentations and discussions that took place in the conference. It should be noted that the Report contains, in part, the summary and perspective of the Report's author and has not been reviewed by most of the conference attendees.

channeled to a variety of processes based on particular criteria, including the nature of the dispute, the relationship between the disputants, the amount in dispute, and the cost and speed of the process.<sup>10</sup> The Pound Conference attendees envisioned ADR as providing varied conflict resolution services that would be more responsive to the needs of parties entering the court system without compromising the judicial mandate to provide for fairness and justice.<sup>11</sup> In response to the Pound Conference and Professor Sander's call for a "multi-door courthouse," the process of institutionalizing ADR began<sup>12</sup> (although initially in a relatively fragmented manner rather than through a systematic, national rollout of any kind).<sup>13</sup>

At the same time, family court service agencies started developing mediation out of existing processes, such as custody evaluation and conciliation counseling.<sup>14</sup> For example, court staff members were trained as mediators beginning with a pilot program in the Los Angeles Conciliation Court in 1973.<sup>15</sup> Similarly, the Family Self-Determination

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10. See McAdoo & Welsh, *supra* note 2, at 402 & n.18 (citing Frank E.A. Sander, *Varieties of Disputing Process*, in POUND PROCEEDINGS, *supra* note 2, at 65, 67).

11. See McAdoo & Welsh, *supra* note 2, at 402–05; see also John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 221–28 & nn.54–55 (2006) (summarizing various perspectives on the role of the court in ensuring justice); Bobbi McAdoo, *All Rise, the Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 380 (2007); Smith & Martinez, *supra* note 7, at 129–30; Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 142–43 (2004) [hereinafter Welsh, *Court-Connected*].

12. See McAdoo & Welsh, *supra* note 2, at 399 (stating that "[w]hen Professor Frank Sander introduced the concept of the multi-door courthouse at the Pound Conference, the great experiment with the institutionalization of court ADR—particularly mediation—began").

13. The closest ADR has come to a national rollout was through the federal Civil Justice Reform Act of 1990 (CJRA), 28 U.S.C. §§ 471–482 (2006), which encouraged experimentation in ADR and case-management.

14. Jay Folberg, *Facilitating Agreement—The Role of Counseling in the Courts*, CONCILIATION COURTS REV., Dec. 1974, at 17, 17–20; Ann Milne, *Custody of Children in a Divorce Process: A Family Self-Determination Model*, CONCILIATION COURTS REV., Sept. 1978, at 1, 1–2; Peter Salem et al., *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741, 744–45 (2007).

15. See Nancy Thoennes, Peter Salem & Jessica Pearson, *Mediation and Domestic Violence*, 33 FAM. COURTS REV. 6, 6 (1995).

program was started in 1974 in Dane County, Wisconsin.<sup>16</sup> By 1980, California mandated mediation in all child-custody disputes,<sup>17</sup> and within a decade, family mediation had spread to thirty-eight states and Washington, D.C.<sup>18</sup>

While court ADR serves a very important function within the overall dispute resolution process and appears to be destined to remain a permanent part of it, court ADR is not fully meeting its aspired to original goals of providing multiple efficient, effective, and fair ADR services. Instead of the hoped-for multi-door courthouse, most jurisdictions<sup>19</sup> offer mediation as the *only* ADR service. Moreover, the types of mediation services offered do not always provide parties with the opportunity to determine the outcome of their dispute on their own terms in a non-coercive environment.<sup>20</sup> In fact, the manner in which ADR is being practiced—and particularly mediation as the most prominently offered ADR service—tends to be more coercive, with diminished fairness safeguards,<sup>21</sup> and as some commentators argue, with potentially negative impacts particularly on the poor, minorities, and women.<sup>22</sup>

Both civil and family ADR programs currently operate within a difficult climate. Courts are dealing with increasing caseloads and decreasing resources.<sup>23</sup> There is a risk that the most recent budget crisis

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16. Milne, *supra* note 14, at 1–2.

17. See Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 633 (2007).

18. See Salem et al., *supra* note 14, at 745.

19. There are some notable exceptions. See, e.g., Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 373–74 (2009); Smith & Martinez, *supra* note 7, at 146.

20. See Salem, *supra* note 19, at 377; Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 5–6 (2001) [hereinafter Welsh, *Thinning Vision*].

21. Timothy Hedeem, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273, 276–85 (2005); McAdoo & Welsh, *supra* note 2, at 430 (stating that the “tendency to order all parties into mediation regardless of its appropriateness, as well as some mediators’ tendency to behave in an overaggressive manner” can and should be curbed); Welsh, *Thinning Vision*, *supra* note 20, at 5–6.

22. Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts over Four Decades*, 84 N.D. L. REV. 705, 731 (2008).

23. See Salem et al., *supra* note 14, at 743 (noting that “[f]or years, family court service

might enhance courts' and court administrators' tendency to perceive ADR as a tool in the narrow service of short-term efficiency. Focusing on short-term efficiency, although an important goal for court ADR programs, often compromises the innovative characteristics of ADR interventions when it is the dominant goal.<sup>24</sup> Indeed, when discussing the landscape of court ADR, multiple conference participants emphasized administrative-cost considerations and the financial crisis as probably the most critical factors to the future of court ADR, and in light of the current trend, some emphasized the need to preserve that which is unique about court ADR.<sup>25</sup>

While the resources available to courts (in general) and court ADR programs (in particular) are shrinking, the need to provide high-quality ADR services and better case management to parties is mounting. One reason for this increase in the need for good services is the surge in pro se litigants who do not know how to navigate the court system, ADR included.<sup>26</sup> A related problem is the proliferation of non-native English speakers, which further magnifies the inaccessibility of the court system

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agencies have faced the challenge of a growing number of referrals of increasing complexity, while staffing and other resources have remained level or, in some cases, been cut"). See generally AM. BAR ASSOC., REPORT: CRISIS IN THE COURTS: DEFINING THE PROBLEM (2011), available at [http://www.americanbar.org/content/dam/aba/images/public\\_education/pub-ed-lawday\\_abare\\_solution\\_crisiscourtsdec2011.pdf](http://www.americanbar.org/content/dam/aba/images/public_education/pub-ed-lawday_abare_solution_crisiscourtsdec2011.pdf).

24. James J. Alfani & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 205–06 (2001); Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found A Better Way?*, 18 OHIO ST. J. ON DISP. RES. 93, 121–22 (2002); Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 439 (2009) [hereinafter Welsh, *Mother's Laugh*].

25. See Panel Discussion, *supra* note 1, at 822 (statement of Professor Susskind) (stating that it is not enough to argue that ADR saves time and money; rather, ADR must provide for an outcome that is "fair, efficient, stable and wise"); *id.* at 807–08 (quoting ELLEN WALDMAN, *MEDIATION ETHICS: CASES AND COMMENTARIES* 117–18 (2011) (stating that many are concerned that it is hard to tell the difference between traditional judicial intervention and ADR mediation)).

26. In fact, this was widely discussed throughout the conference and was designated as one of the key issues for the future of ADR by the conference attendees as reflected in their choice to make the issue of pro se litigants one of the five areas of focus. For further discussion, see *supra* notes 2, 6, 9–10 and accompanying text. Another strongly related area of focus designated as central to the future of ADR was economic status. See Salem et al., *supra* note 14, at 746–48.



to many.<sup>27</sup> These challenges are compounded by the rise in high conflict,<sup>28</sup> often resulting in relitigation,<sup>29</sup> as well as by the foreclosure crisis and the severe economic downturn. Courts serving families face additional unique challenges: incidents of reported domestic violence, abuse and neglect, and substance abuse are more widespread, which further complicate the manner in which justice is administered to families.<sup>30</sup> These mounting needs, both in family and general civil disputes, often require a wide range of ADR interventions alongside the traditional, adversarial litigation option.

The pressures that court-ADR programs are facing can trigger a “circling of the wagons” mentality within the ADR community aimed at preserving what is already in place. Or, it can lead to a careful look at the existing ADR programs with an eye toward enhancing them to meet both courts’ goals and parties’ needs without compromising the unique ADR innovations and the fairness and justice functions ADR must serve.<sup>31</sup> The primary focus of the conference was on the latter approach: to improve and grow ADR based on some of the successful models already in existence, utilizing the knowledge and expertise accumulated

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27. See ALFRED P. CARLTON, JR., ABA, JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 64 (2003), <http://www.abavideonews.org/ABA263/finalreport.pdf> (stating that “Courts should enact measures to minimize language barriers so that non-English speaking citizens are not deterred from pursuing their legal rights in American courts”).

28. Salem et al., *supra* note 14, at 746 (stating that high conflict is “‘identified by multiple, overlapping criteria: high rates of litigation and relitigation, high degrees of anger and distrust, incidents of verbal abuse, intermittent physical aggression, and ongoing difficulty communicating about and cooperating over the care of their children.’” (quoting JANET R. JOHNSTON & VIVIENNE ROSEBY, IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF HIGH-CONFLICT AND VIOLENT FAMILIES 4–5 (1997))).

29. Salem et al., *supra* note 14, at 746–47.

30. *Id.* at 747 (stating that “[i]ncreased levels of reporting and incidence of domestic violence, child abuse and neglect and chemical dependency add significant complications to the dispute resolution process”).

31. See Timothy Hedeon, *Remodeling the Multi-door Courthouse to “Fit the Forum to the Folks”*: How Screening and Preparation Will Enhance ADR, 95 MARQ. L. REV. 941, 944 (2012); Julie Macfarlane, *ADR and the Courts: Renewing our Commitment to Innovation*, 95 MARQ. L. REV. 927, 928–29 (2012); Nancy A. Welsh, *The Current Transitional State of Court-Connected ADR*, 95 MARQ. L. REV. 873, 877 (2012).

since the emergence of ADR due to research and experience.<sup>32</sup> This Report hopes to contribute toward these efforts.

The next four Parts of the Report, Parts III–VI, will initially focus on mediation and the role of the mediator; shift toward the broader role of an ADR intervener, whether as a neutral in the classic mediation sense or otherwise; and finally turn to the importance of clarity in goal-setting, design, and implementation of ADR programs. This progression mirrors and expands upon the conference-framing plenary session.

### III. COURT-CONNECTED MEDIATION

Despite Professor Sander's call for a "multi-door courthouse," mediation became the primary ADR process in the family and broader civil arenas.<sup>33</sup> In the family context, California was the first to adopt statewide, mandatory mediation in all custody disputes in 1980,<sup>34</sup> and approximately thirty-seven states and the District of Columbia followed suit.<sup>35</sup> In the civil context, most programs offer "essentially only one process—a malleable, hybrid form of mediation."<sup>36</sup> Since court-connected mediation was the launching point for the discussion of court ADR that exists beyond mediation, this Report will start by briefly discussing court-connected mediation to provide some context for the "beyond."<sup>37</sup> In fact, mediation is not only the central component of any ADR program, both presently and likely in the future, but it also has been one of the most researched and debated court ADR processes.<sup>38</sup> As a result, reviewing the discussion concerning mediation provides the

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32. See Hedeem, *supra* note 31, at 941–42; Macfarlane, *supra* note 31, at 939; Welsh, *supra* note 31, at 879.

33. Salem et al., *supra* note 14, at 744; see also McAdoo & Welsh, *supra* note 2, at 403.

34. Edwards, *supra* note 17, at 633; see also Salem et al., *supra* note 14, at 745 (stating that mandatory mediation started in California in 1981).

35. Salem et al., *supra* note 14, at 745; Carrie-Anne Tondo et al., Note, *Mediation Trends: A Survey of the States*, 39 FAM. CT. REV. 431, 433 (2001).

36. Brazil, *supra* note 24, at 116.

37. Mediation was not the central theme of the conference and, therefore, was not discussed in depth; the context-setting discussion in this Part is based, unless noted otherwise, on the author's perspective rather than those attending the conference.

38. See, e.g., Bobbi McAdoo, Nancy A. Welsh & Roselle A. Wissler, *Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?*, DISP. RESOL. MAG., Winter 2003, at 8.

best context for examining some important questions relevant to all other types of ADR systems.

*A. The Goals of Mediation and Court-Connected Challenges*

Most proponents of mediation envisioned a process founded on the idea of providing parties with the opportunity to self-determine the outcome of their dispute.<sup>39</sup> Although not in a uniform manner, a broad understanding of self-determination has gradually narrowed, a narrowing that directly impacts the manner in which mediation is practiced.<sup>40</sup> This “thinning” self-determination is in major part a result of the potential, but not necessary, tension between the goal of self-determination and an over focus on narrow administrative efficiency considerations.<sup>41</sup>

Mediation was originally intended as a voluntary and informal process designed to empower parties to explore the resolution of their disputes on their own terms rather than within the existing adversarial and legally rigid formal process.<sup>42</sup> These goals are often encapsulated within the concept of self-determination, originally understood as the promise that the parties will have the power to determine the outcome of their dispute in a non-coercive, voluntary environment.<sup>43</sup> The process

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39. Welsh, *Thinning Vision*, *supra* note 20, at 7–8.

40. *Id.* at 25–26.

41. Alfini & McCabe, *supra* note 24, at 205–06; Dorothy J. Della Noce, Joseph P. Folger & James R. Antes, *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection*, 3 PEPP. DISP. RESOL. L.J. 11, 29–32 (2002); Nancy A. Welsh, *Perceptions of Fairness*, in *THE NEGOTIATOR'S FIELDBOOK* 165, 171 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

42. See Brazil, *supra* note 24, at 109; Welsh, *Mother's Laugh*, *supra* note 24, at 454; Welsh, *Thinning Vision*, *supra* note 20, at 4 (“[T]he originally dominant vision of self-determination assumed that the disputing parties would be the principal actors and creators within the mediation process. The parties would: 1) actively and directly participate in the communication and negotiation that occurs during mediation, 2) choose and control the substantive norms to guide their decision-making, 3) create the options for settlement, and 4) control the final decision regarding whether or not to settle.”).

43. Panel Discussion, *supra* note 1, at 810–12 (statement of Professor Stulberg) (arguing that mediation is unique because it promotes self-determination and personal responsibility and should focus on allowing parties to make an informed decision that is not just based on legal rights and to order their lives as a political community); Salem, *supra* note 19, at 375 (stating that “[t]he argument for the importance of self-determination that mediation offers is as follows: If parents are able to participate in mediation, they will be better able to fully explore options, truly hear one another, and ultimately be empowered to make their own

characteristics incorporated into mediation in support of this understanding of self-determination are the voluntary participation and decision-making by the parties, as well as the neutrality of the third-party mediator.<sup>44</sup> Confidentiality is also a significant characteristic meant to guarantee the open and non-coercive nature of mediation.<sup>45</sup>

As reflected in the opening plenary session of the conference, how these characteristics are precisely defined and how they interplay can vary. Some, like Professor Susskind, would argue that while the parties should determine their own outcome, the mediator has a responsibility to ensure that the outcome is of the best quality and as fair as can be, not only as applied to the parties but also to others that may be impacted by the results.<sup>46</sup> Others, like Professor Stulberg, argue that making the mediator responsible for the outcome would inevitably undermine self-determination and, therefore, must be rejected;<sup>47</sup> instead, the focus in mediation should be on allowing the parties themselves to decide what is right for them.<sup>48</sup> While this debate reflects variance, it also shows that these characteristics of mediation have been and still are central to the practice of mediation, even if the precise manner of implementation may vary in practice.<sup>49</sup> Indeed, mediation proponents generally believe that adherence to the core characteristics of mediation in the actual practice of mediation is necessary to ensure that mediation meets the goal of self-determination.<sup>50</sup>

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decisions that determine their own future”); see also Welsh, *Mother's Laugh*, *supra* note 24, at 432; Welsh, *Thinning Vision*, *supra* note 20, at 18–20.

44. Alfani & McCabe, *supra* note 24, at 173; Welsh, *Mother's Laugh*, *supra* note 24, at 432; Welsh, *Thinning Vision*, *supra* note 20, at 92 (stating that “[s]elf-determination has been identified as the fundamental, core characteristic of the mediation process”).

45. See UNIF. MEDIATION ACT § 8 (2003).

46. See Panel Discussion, *supra* note 1, at 809; Reporter's Notes, *supra* note 8.

47. See Panel Discussion, *supra* note 1, at 811; Reporter's Notes, *supra* note 8.

48. See Panel Discussion, *supra* note 1, at 811; Reporter's Notes, *supra* note 8. For an additional perspective on the issue of power-balancing in mediation, see Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 35–48 (2012), which discusses “party-centered” mediation (transformative mediation being one such approach) as a way to safely handle power-imbalances, provide for substantive fairness, and in the process, strengthen civic society.

49. For one framing of the various mediation models, see Ellen E. Waldman, *Identifying the Role of Social Norms in Mediation: a Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997).

50. Welsh, *Thinning Vision*, *supra* note 20, at 18–20.

In the court-connected context, these characteristics of mediation, as a manifestation of self-determination, were also relied on in support of the argument that mediation can be fair in a manner that meets the courts' mandate to provide for justice.<sup>51</sup> Indeed, self-determination, defined broadly, was one of the central justifications for diverging from the formal protections and the legal norms that would be applied to the parties had they gone through the traditional process offered by courts.<sup>52</sup> The fact that parties have the ability to voluntarily and meaningfully participate in the process of deciding their outcome, along with having the sufficient knowledge needed to make such a decision,<sup>53</sup> is meant to provide for a fair process, however fairness is defined.<sup>54</sup>

While self-determination (and its varying definitions) certainly plays a role in shaping court-connected mediation,<sup>55</sup> perhaps the most significant factor in determining how mediation is actually practiced is administrative efficiency.<sup>56</sup> As noted by a number of those who attended the conference, administrative efficiency can be constructed narrowly to

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51. McAdoo & Welsh, *supra* note 2, at 401–05, 431–32 (2005); Welsh, *Court-Connected*, *supra* note 11, at 139–40.

52. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548 (1991) (stating that “the process is said to enable the parties to exercise self-determination and eliminate the hierarchy of dominance that characterizes the judge/litigant and lawyer/client relationships”); Welsh, *Thinning Vision*, *supra* note 20, at 93 (stating that “if courts and mediation advocates act now to define and protect self-determination, mediation may yet become a process that is qualitatively different and better than the traditional dispute resolution processes found within the courts”).

53. See Reporter's Notes, Comments made by Professor Judith McMullen at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) [hereinafter McMullen Comments] (discussing “What Do Stakeholders Want & Need—Court and Neutrals?”).

54. The terms fairness or justice can be defined in various ways, *see generally* Smith & Martinez, *supra* note 7, at 128–29, and trying to provide more specific definitions is beyond the scope of this Report. Generally, the discussion of fairness and justice in mediation has revolved around the concept of procedural justice: the ability of parties to have choice and voice within the process. *See* Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RES. 81, 88; McAdoo & Welsh, *supra* note 2, at 410. Regardless of how “fairness” and “justice” are specifically defined, self-determination was meant to guarantee these.

55. Welsh, *Thinning Vision*, *supra* note 20, at 33.

56. Alfini & McCabe, *supra* note 24, at 174 (stating that “an emphasis on judicial economy, through promoting the general policy favoring settlement, may sometimes be inconsistent with a desire to preserve mediation's core values such as party self-determination”); Welsh, *Mother's Laugh*, *supra* note 24, at 454–55.

encompass short-term judicial economy considerations: Does the intervention dispose of cases, free the court's dockets, and preserve court resources? Or, more broadly, it can be understood to include effectiveness in meeting the court's role of providing access to justice, administering justice fairly, and providing for long-term sustainable resolution.<sup>57</sup>

The broad definition does not necessarily preclude the narrow one; however, an exclusively narrow focus can dramatically impact the manner in which mediation (or any other ADR intervention) is implemented at the expense of the intervention's stated goals and innovative value. Indeed, how the mediation process is set up within the court system will likely dictate more about the quality of the intervention than the training and intentions of the mediator. In the words of Dr. Mayer, "I think that's exactly the relevance of how the system tees things up—it determines in many ways whether what we are engaged in is a responsible approach to dealing with cases or not."<sup>58</sup>

While a number of court mediation programs are not only carefully and thoughtfully designed and implemented, it appears that a fair number of such programs incorporate mediation based on narrow administrative considerations, due to a focus on case management and due to limited resources.<sup>59</sup> The primary goal for mediation for courts with such a narrow focus has become more and more the efficient—quick and cheap—settlement of cases, which is certainly an important goal for court ADR programs, but one that must not trump other important goals, such as self-determination, fairness, and justice.<sup>60</sup>

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57. McAdoo & Welsh, *supra* note 2, at 432; Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327, 339–40 (2003); *see also* Panel Discussion, *supra* note 1, at 816 (statement of Professor Susskind) (commenting that process should be fair, efficient, stable, and wise).

58. *See* Panel Discussion, *supra* note 1, at 812. The term "neutrality," according to Dr. Mayer, cannot be defined independently of the system within which the neutral, mediator, or other intervener operates.

59. Alfini & McCabe, *supra* note 24, at 174 (stating that "an emphasis on judicial economy, through promoting the general policy favoring settlement, may sometimes be inconsistent with a desire to preserve mediation's core values such as party self-determination"); Welsh, *Mother's Laugh*, *supra* note 24, at 454–55.

60. Alfini & McCabe, *supra* note 24, at 205–06; Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 FORDHAM URB. L.J. 273, 286–88 (2010); Salem, *supra* note 19, at 377.

Mediation driven primarily by narrow administrative efficiency considerations may include the following relatively coercive features found in various jurisdictions: mediation would be settlement focused,<sup>61</sup> mandatory,<sup>62</sup> and relatively short;<sup>63</sup> allow for or require the evaluation of the parties' claims;<sup>64</sup> and allow for or require the mediator to report parties' good faith participation and provide a recommendation to the court based on the content of the mediation.<sup>65</sup> Each one of these

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61. Welsh, *Mother's Laugh*, *supra* note 24, at 438 (stating that "[r]esearch suggests that institutional and financial pressures have forced court-connected mediation (and mediators) to become predominantly evaluative, directive—and even coercive" with a focus on "brokering a deal").

62. See Panel Discussion, *supra* note 1, at 823 (statement of Professor Susskind) (stating that "'mandatory mediation' is a contradiction in terms"). A number of mediation programs, such as custody mediation in California, are mandatory, creating an obvious tension with the presumably voluntary nature of mediation. Proponents of mandatory mediation argue that while entering the process is mandatory, how the parties choose to participate once attending mediation is completely voluntary. See *id.* at 824 (statement of Professor Stulberg) (stating that coerced *into* mediation is not the same as coercion *in* mediation). For a discussion and critique of mandatory mediation, see Landsman, *supra* note 60, at 286; see also Dorcas Quek, *Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Connected Mediation Program*, 11 CARDOZO J. CONFLICT RESOL. 479, 484–96 (2010) (outlining the debate over mandating parties to mediation and suggesting that the manner in which mediation can be mandated is best viewed along a continuum).

63. Edwards, *supra* note 17, at 656; Hugh McIsaac, *A Response to Peter Salem's Article "The Emergence of Triage in Family Court Services: Beginning of the End for Mandatory Mediation,"* 48 FAM. CT. REV. 190, 191 (2010); Salem, *supra* note 19, at 377 (stating that "[i]f mediators lack sufficient time to conduct mediation, it is simply not possible to honor, protect and nurture parties' self-determination").

64. Kimberlee K. Kovach & Lela P. Love, "Evaluative" Mediation Is an Oxymoron, 14 ALTERNATIVES HIGH COST LITIG., Mar. 1996, at 31, 31; Welsh, *Mother's Laugh*, *supra* note 24, at 454–55.

65. For example, under Nevada foreclosure mediation, "mediators are *required* to submit a report stating if sanctionable actions occurred in the mediation and recommending what sanctions should be imposed . . . [and] the district court [is then required] to sanction mediation participants if the mediator reports 'sanctionable' behavior." See Heather Scheiwe Kulp, *Groundbreaking Court Decision Requires Courts to Comply with Mediators*, JUST CT. ADR (July 15, 2011), <http://blog.aboutrsi.org/2011/ethics/groundbreaking-court-decision-requires-courts-to-comply-with-mediators/> (citing NEV. REV. STAT. § 107.086(5) and *Pasillas v. HSBC Bank USA*, 255 P.3d 1281 (Nev. 2011)). These requirements, according to one commentator, "put[] the mediator in the position of being the final judge, a position that violates party self-determination—the essential ingredient that separates mediation from other processes." *Id.*

Reporting also takes place in the context of California custody mediations. See McIsaac, *supra* note 63, at 193 (stating that "[a]lready, in California some courts contaminate the confidential mediation process with reporting to the court and are experiencing a loss of trust

features may not on its own compromise the quality of mediation being offered. For example, a more directive form of mediation, such as evaluative mediation, may be appropriate in some cases and, in fact, may be precisely what the parties want. Such features, however, can undermine self-determination to various degrees by undercutting voluntariness, neutrality, and confidentiality, and by taking away the ability of the parties to make their own decisions in a non-coercive environment.<sup>66</sup> This is particularly so where the mediation programs that include such directive and relatively coercive features do not incorporate informed consent by the parties as a component of the process. This reality raises the question whether the benefits of mediation as it seems to be practiced on a fairly wide scale—benefits defined differently based on the perspective of different stakeholders—outweigh, or should outweigh, the potential harm to the parties and even the damage done to how people perceive courts as public institutions.

### B. Court-Connected Mediation—Going Forward

To justify the practice of mediation as part of the court system, mediation must be practiced in a manner consistent with its stated goal of self-determination and with the intertwined characteristics of neutrality, confidentiality, and voluntariness.<sup>67</sup> As a starting point, this

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and accusations of bias” (citing Gary Klien, *State Orders Audit of Marin Family Court*, MARIN INDEP. J. (July 1, 2009), [http://www.mariniij.com/marinnews/ci\\_12736575?IADID](http://www.mariniij.com/marinnews/ci_12736575?IADID))); see also CAL FAM. CODE § 3183 (West 2007). Apparently, in California, neutrals who work in a custody ADR process that allow for reporting are no longer referred to as “mediators,” but rather as “Recommending Counsel,” in order to avoid “mediation bias.” See CAL FAM. CODE § 3183 (West 2007); Reporter’s Notes, Comments made by Ernie Sanchez at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) [hereinafter Sanchez Comments] (discussing “What Do Stakeholders Want & Need—Courts & Neutrals?”). Regardless of the actual title the intervener receives, the ability to report can coerce parties into settling based on the recommendation they receive, given that the trial court will consider the mediator as unbiased.

66. Salem, *supra* note 19, at 377–79; *supra* notes 62, 63 & 65.

67. McAdoo & Welsh, *supra* note 2, at 431–32; Noce, Folger & Antes, *supra* note 41, at 31; Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 776–77 (1999) (arguing that informed consent is essential to the practice of mediation in a manner consistent with autonomy and self-determination); see also Timothy Hedeon, *Mediation as Contact Sport? Issues of Fitness and Fit Arising from Georgia’s Wilson v. Wilson*, DISP. RESOL. MAG., Winter



will require a clearer definition of self-determination in relation to these characteristics and the establishment of mechanisms that will relieve the pressure that is put on parties to settle as well as mechanisms that might also encourage mediators to not over-aggressively push for settlement where settlement is either not appropriate or not desired by the parties.<sup>68</sup> What is needed most is the clear articulation of court mediation programs' goals and practices that are consistent with self-determination and the related characteristics of neutrality, confidentiality, and voluntariness not only within the operation of the actual mediation process itself but also within the manner that mediation is set up as part of the larger court process.<sup>69</sup> Courts and mediation programs would have to ensure that mediators adhere to such goals.<sup>70</sup>

Conference participants consistently stated that the level and type of institutional support will determine how the mediator will actually behave as much as, if not more than, the actual intentions of the mediator. While there are many others, some of the significant areas to be improved identified in the conference were providing for sufficient time in the mediation, allowing opportunities for additional sessions, and not pressuring the mediators to exclusively focus on achieving settlement at all costs.<sup>71</sup>

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2009, at 24, 27.

68. McAdoo & Welsh, *supra* note 2, at 426–27 (“Court rules should make it clear that . . . mediation is expected to be a dignified process. Further, . . . even if courts allow or encourage mediators to provide their assessments of parties’ cases, courts should prohibit mediator recommendations regarding appropriate settlements and over-aggressive evaluation.”); Welsh, *Thinning Vision*, *supra* note 20, at 78–79.

69. Hedeem, *supra* note 67, at 27; Nolan-Haley, *supra* note 67, 778–79 (discussing the need for informed consent to guarantee that the manner that parties enter the mediation process is fair).

70. Hedeem, *supra* note 67, at 27; Welsh, *Thinning Vision*, *supra* note 20, at 78–91. One way to adhere to such a goal is to implement and require an extensive informed consent process. See Nolan-Haley, *supra* note 67, at 779–80 (proposing “a contextualized approach to informed consent with a sliding-scale model of disclosures” in order to ensure that parties enter into the mediation process in a truly consensual manner and are treated fairly within the process). For an extensive discussion of customizing mediation to meet the parties’ needs by including their input, which is ultimately the best form of self-determination, see Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863 (2008).

71. For further analyses of some of the current issues facing ADR, see Bernie Mayer, *What We Talk About When We Talk About Neutrality: A Commentary on the Susskind–*

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While mediation is one ADR process that needs improvement, mediation, even when practiced appropriately, is not always the right intervention for all disputes, which may involve parties that, to different extents, lack the ability or desire to self-determine. Such limitations, however, do not mean that ADR interveners cannot play a different and significant role within court ADR programs other than as mediators, as long as the role is well-defined and the process itself is well-designed and implemented to benefit the parties and be fair to them.

Indeed, the role of the intervener may vary as long as the process of intervention is fair and transparent. For Professor Susskind, regardless of the role of the intervener, a process has to lead to a fair (as perceived by the parties), efficient, stable, wise, and well-informed resolution. According to him, a well-designed, high-quality process will lead to such outcomes.<sup>72</sup> For Dr. Mayer, the intervener has to be transparent and realistic about his role, which is not to ensure a good outcome, but rather to provide disputants with the opportunity to engage constructively.<sup>73</sup> For Professor Stulberg, being impartial is preferred, but not necessary, as long as the process is fair and viewed as such by the participants.<sup>74</sup> Indeed, as long as the intervener is perceived to be open-minded and even-handed, parties seem to be less concerned about impartiality—in the sense that this term is used in the mediation context—of the third party.<sup>75</sup> All the panelists emphasized that ADR professionals must keep in mind that the role of the intervener is to serve the parties, not the courts, and that any ADR process has to be structured in a manner that will allow the intervener to intervene ethically.<sup>76</sup>

The following section of the Report, which is primarily based on discussions and panels that took place at the conference, will explore

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*Stulberg Debate, 2011 Edition*, 95 MARQ. L. REV. 859 (2012); and Joseph B. Stulberg, *Must a Mediator Be Neutral? You'd Better Believe It!*, 95 MARQ. L. REV. 829 (2012).

72. Panel Discussion, *supra* note 1, at 816–17.

73. See Reporter's Notes, Comments made by Dr. Bernard Mayer at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) [hereinafter Mayer Comments].

74. See Panel Discussion, *supra* note 1, at 817–18 (statements of Joseph Stulberg).

75. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 820–21 & n.164 (2001).

76. See Panel Discussion, *supra* note 1, at 821–23.

how courts that wish to support effective ADR programs that include interventions other than mediation may address these similar challenges.

#### IV. BEYOND MEDIATION

As noted in the second panel of the conference, ADR processes other than mediation that might have mediative components may be more appropriate to some conflicts.<sup>77</sup> Similarly, Dr. Julie Macfarlane encouraged the abandonment of “the one-size fits all fallacy.”<sup>78</sup> Indeed, there are situations where there is a risk that one party will use mediation to coerce the other into an agreement or parts of one, such as when particular types of domestic violence are involved or when one party has a significantly higher level of power that is being used in the mediation as leverage. There are other situations where one or both of the parties lack the capacity to meaningfully participate due to mental illness or substance abuse.<sup>79</sup> There are also parties that are incapable of making decisions on their own in mediation due to the level of conflict and dysfunction.<sup>80</sup> While this level of high conflict is not found in the

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77. See Reporter’s Notes, Comments made by Jackie Hagerott at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing “What Do Stakeholders Want & Need—Court and Neutrals?”) (asking whether “mediative functions [can] be distributed to others in the court” and stating that other processes with “mediative components” may be more appropriate).

78. See Reporter’s Notes, Comments made by Dr. Julie Macfarlane at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) [hereinafter Macfarlane Comments] (discussing “Contemporary Practices Meeting These Needs”).

79. Indeed, many mediation programs screen for and continuously monitor capacity issues and are required to do so under various professional codes. See Patrick G. Coy & Timothy M. Hedeon, *Disabilities and Mediation Readiness in Court-Referred Cases: Developing Screening Criteria and Service Networks*, 16 MED. Q. 113, 115–20 (1998); Hedeon, *supra* note 31, at 945–46; Judy Cohen, *The ADA Mediation Guidelines: A Community Collaboration Moves the Field Forward*, MEDIATE.COM (Jan. 2002), <http://www.mediate.com/articles/cohen3.cfm>; Sanchez Comments, *supra* note 65.

80. Coy & Hedeon, *supra* note 79, at 118; Salem et al., *supra* note 14, at 750–52 (discussing how many high-conflict families fail to benefit from mediation and therefore should be pre-identified and be allowed to bypass mandatory mediation and enter into more directive and intrusive interventions, such as parenting coordination); Cohen, *supra* note 76, at 6. See generally Amy Holtzworth-Munroe, Connie J.A. Beck & Amy G. Applegate, *The Mediator’s Assessment of Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain*, 48 FAM. CT. REV. 646 (2010) (discussing domestic violence and potential measures for identifying the level of conflict mediation parties may be facing before they enter into mediations).

majority of cases, it often requires the bulk of courts and their professionals' attention.<sup>81</sup> Finally, there may be parties that simply want a lesser level of self-determination and instead expect to be directed to a solution, or to be provided with information that will better help them reach one.<sup>82</sup> All of these parties, for different reasons, may need an intervention that includes mediative functions but is nonetheless something other than mediation.

In fact, while mediation is not always the best intervention for everybody, parties in many cases can still benefit from other effective and efficient ADR interventions.<sup>83</sup> Rather than assume a "pure" self-determination versus coercion binary, there is room for ADR processes with varying degrees of "convergence" between self-determination and directiveness.<sup>84</sup> It follows that the role of the ADR intervener will change according to the levels of convergence within a given ADR process. Courts that incorporate ADR should consider providing different types of interventions for different types of conflict and capacity levels. This should be done along a continuum that starts with non-directive mediation and gradually moves toward a blend of mediative and more directive characteristics, matching interventions to needs.<sup>85</sup> Such an approach will not only benefit the parties, but it will also be a more prudent use of courts' scarce resources and likely enhance the manner in which the courts are perceived and experienced by the public it serves.<sup>86</sup>

The next Part of the Report will explore the interplay between self-determination and directiveness within two specific ADR interventions

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81. Salem et al., *supra* note 14, at 748.

82. See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 679, 684–85 (2002) (explaining that when the mediator evaluates the merits of the case or suggests a settlement, the case is more likely to settle and that some parties and their attorneys perceived the evaluation as enhancing the fairness of the mediation process).

83. Reporter's Notes, Day 1, Panel 4, "Contemporary Practices Meeting These Needs," at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) [hereinafter *Contemporary Practices*].

84. *Id.*; Macfarlane Comments, *supra* note 78; see also JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* 20–22 (2008); Peter Salem, *A Distinction Without Much of a Difference: Response to Steve Baron and Hugh McIsaac*, 48 FAM. CT. REV. 201, 203 (2010) [hereinafter *Salem, Response*].

85. Salem et al., *supra* note 14, at 749–50; *Contemporary Practices*, *supra* note 83.

86. Brazil, *supra* note 24, at 123–24.

that were the subject of presentations at the conference: ENE and PC. It will also highlight some important fairness concerns related to these processes. While at the conference these interventions were discussed in the family context, the discussion below intends to draw out some principles that can be applied to a broader context of ADR.

*A. Early Neutral Evaluation*

ENE, one of the topics presented at the conference discussed within the family context,<sup>87</sup> is an example of an ADR process that was developed with a view toward the core characteristics and goals of mediation: confidentiality, impartiality, and certain degrees of self-determination. ENE is transparently more directive than the classic approach to mediation used in the family context, which tends to be (or at least intends to be) on the elicitive and facilitative side.<sup>88</sup> The ENE process, as practiced in Minnesota and presented at the conference, starts with a case management conference subsequent to a custody-related court filing. A team of male and female evaluators—a particular adaptation to the family context—explain the process to the parties and stress the importance of the parents' voice within it.<sup>89</sup> The evaluators then gather what they deem to be sufficient facts from the parties to determine what would be the best outcome for them, with a special consideration of the children's needs. The determination is then conveyed in the form of a recommendation to the parties.<sup>90</sup> Following the recommendation, the ENE team meets with both sides to shape an agreement that can be tailored to meet the needs of the parties and their families.<sup>91</sup> Approximately 70% of cases are reported to settle through the ENE process, as practiced in Minnesota.<sup>92</sup>

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87. For a good discussion of ENE within the family context, see Yvonne Pearson et al., *Early Neutral Evaluations: Applications to Custody and Parenting Time Cases Program Development and Implementation in Hennepin County, Minnesota*, 44 FAM. CT. REV. 672 (2006).

88. See MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, (2000); Welsh, *Mother's Laugh*, *supra* note 24, at 454.

89. See Reporter's Notes, Comments made by Jim Getz at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing "Contemporary Practices Meeting These Needs").

90. *Id.*

91. *Id.*

92. *Id.*

In comparison, under an ENE program established in the civil context in the Northern District of California, parties that are assigned to the process must attend “with the attorney who will be lead counsel should the case go to trial.”<sup>93</sup> Prior to the ENE session, each side submits a statement to the neutral that identifies session participants, major disputed issues, and any discovery that would be necessary for meaningful settlement discussions.<sup>94</sup> The protocol of the session itself is very structured: following an explanation of the program and procedures, each side presents an opening statement outlining their arguments.<sup>95</sup> The evaluator may ask questions and probe for strengths and weaknesses.<sup>96</sup> The evaluator then identifies issues in agreement and issues in dispute, and adjourns to a separate room to prepare a written evaluation.<sup>97</sup> Before sharing the evaluation, the parties are encouraged to explore settlement with the help of the evaluator.<sup>98</sup> If either party declines, the evaluator discloses their written assessment and again facilitates discussions.<sup>99</sup> If no settlement is produced, the evaluators may help the parties develop an efficient approach to case management.<sup>100</sup> With the consent of the court, the parties may agree to a follow-up meeting with the evaluators.<sup>101</sup>

The goal of ENE, whether in the family context or in a broader civil context, is to educate the parties by providing them with a reality check<sup>102</sup> that may help them recalibrate their expectations and move them away from entrenched, non-compromising positions. With this reality-check in place, the parties, with the help of the evaluators, are in a better position to come up with their own solutions and agreements. Although the recommendation is non-binding and confidential, the evaluators are relying on the informal authority of their position and

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93. Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1490 (1994).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1490–91.

99. *Id.* at 1491.

100. *Id.*

101. *Id.*

102. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 969 (2000).

expertise to encourage and direct the parties toward a solution that fits within the recommendation of the evaluators.

The requirement to “make your case” to the evaluators coupled with the injection of the professional opinion of the evaluators tends to undermine self-determination in the original sense of the term.<sup>103</sup> However, ENE includes characteristics that provide a counter-balance to this somewhat diminished level of self-determination. For one, the process is transparent, satisfying the requirement, as stated by Dr. Mayer, to provide “accurate labels of the neutral intervener’s role, labels that do not mislead the parties.”<sup>104</sup> Moreover, similar to mandatory mediation in many jurisdictions, although the initial attendance may be mandatory, continued participation in ENE is voluntary, at least in the family context, giving the parties the option to opt out once the process is explained to them and at any later point in time. While attending and participating in the civil ENE program described above appears to be mandatory, the evaluator’s assessment is not binding. The civil ENE program seems to assume that the parties will be represented by counsel, further mitigating the threat of coercion. Perhaps most significantly, the assignment to ENE in the Northern District of California involves the participation of the parties and their lawyers.<sup>105</sup> In other words, ENE, especially as practiced in Minnesota but also in the Northern District of California, is designed to ensure a meaningful process of informed consent.

In addition to transparency and choice, the process is confidential, allowing for a frank and open discussion without concerns over how the ENE process, and particularly the recommendation itself, may impact the outcome of the dispute if it ends up being litigated. Finally, the evaluators try to maximize the parties’ opportunities to make their own decisions at various stages of the process within the constraints of the recommendation or, as the example from the Northern District of California illustrates, even prior to the recommendation being made.<sup>106</sup>

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103. See Kovach & Love, *supra* note 64, at 31; Welsh, *Thinning Vision*, *supra* note 20, at 17–18 (self-determination originally “promised disputants the opportunity to participate actively and directly in the process of resolving their dispute, control the substantive norms guiding their discussion and decision-making, create the options for settlement, and control the final outcome of the dispute resolution process”).

104. Mayer Comments, *supra* note 73.

105. See *infra* text accompanying notes 150–156.

106. See *supra* notes 98–99 and accompanying text. A different innovative approach to encouraging self-determination can be found in an online negotiation tool titled “Getting

The relatively high level of self-determination and lowered level of coercion, the potential benefits derived by the parties, and the efficient use of court resources all justify the use of ENE within court systems. Some important issues to consider when exploring the inclusion of ENE include whether parties should be mandated to participate in the process; at what point of the process the parties should be allowed to opt out, if at all, after the initial explanation or after a good faith attempt to reach a resolution following the recommendation; and whether the recommendation of the evaluators will remain confidential and not be reported to the presiding judge. Depending on the approach adopted, the levels of directive-ness, intrusion, and potential coercion will shift. Regardless, ENE may be a more appropriate ADR process for parties that cannot reap the benefits of non-coercive mediation as long as it is set up appropriately.

### B. Parenting Coordination

Parenting coordination (PC) is an example of an ADR intervention within the family context that contains directive and even potentially coercive features, depending on the particular manner in which it is practiced. Although spreading, PC is not a very widely used court ADR intervention. PC as practiced in Florida was presented at the conference by Linda Fieldstone and may serve as a model for other jurisdictions to consider. Although featured in the family context, the most important feature of PC—having disputants commit to an ADR intervention for a period of time—might be relevant to other civil disputes, especially those that involve an ongoing relationship. On a broader level, the conclusions from the discussion of PC in the family context can apply to other ADR interventions that tend to be more directive or even coercive.

According to the *Guidelines for Parenting Coordination*, developed by the Association of Family and Conciliation Courts Task Force on Parenting Coordination, the goals of the process are “to assist high conflict parents to implement their parenting plan, to monitor

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Divorced Online” developed for the Dutch Legal Aid Board. This tool provides the divorcing parties with the relevant information, legal and otherwise, that allows them to evaluate their cases better *on their own* as well as facilitates communication between the parties. See generally Martin Gramatikov & Laura Klaming, *Getting Divorced Online: Procedural and Outcome Justice in Online Divorce Mediation* (TISCO Working Paper Series on Civil Law and Conflict Resolution Systems, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1752903](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1752903).



compliance with the details of the plan, to resolve conflicts regarding their children and the parenting plan in a timely manner, and to protect and sustain safe, healthy and meaningful parent-child relationships.”<sup>107</sup> Under PC, the coordinator provides the parties with a psycho-educational framework, helps the parties develop negotiating skills, and works to resolve parenting-related disputes.<sup>108</sup> Where the parties cannot reach a consensual agreement on their own, the parenting coordinator can make enforceable recommendations.<sup>109</sup>

PC is particularly useful for high-conflict parenting disputes where the parents are not able to resolve their child-related disputes on their own and constantly revert to relying on the courts to intervene.<sup>110</sup> For these reasons, this intervention can also benefit courts.<sup>111</sup> Some of the characteristics of PC, such as educating the parties with the hope that they themselves will change their destructive dynamic and, in the process, empowering them to make their own decisions, are consistent with the goal of self-determination.<sup>112</sup> Some of the other characteristics of PC, on the other hand, tend to be coercive: there are no guarantees of confidentiality, and the coordinator can, depending on the court order, tell the parties what they must do in the event they cannot agree themselves.<sup>113</sup> Indeed, PC can potentially put the intervener in the position of an arbitrator,<sup>114</sup> which is as coercive and as binding as litigation but without the procedural and substantive fairness guarantees

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107. Assoc. of Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination, *Guidelines for Parenting Coordination*, 44 FAM. CT. REV. 164, 165 (2006).

108. See Reporter's Notes, Comments made by Linda Fieldstone at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) [hereinafter Fieldstone Comments] (discussing “Contemporary Practices Meeting These Needs”).

109. *Id.*

110. *Id.*; Wilma J. Henry et al., *Parenting Coordination and Court Relitigation: A Case Study*, 47 FAM. CT. REV. 682, 694 (2009).

111. Henry et al., *supra* note 110, at 694; Fieldstone Comments, *supra* note 108.

112. Fieldstone Comments, *supra* note 108.

113. See Sherrill W. Hayes, “More of a Street Cop than a Detective”: An Analysis of the Roles and Functions of Parenting Coordinators in North Carolina, 48 FAM. CT. REV. 698, 703, 706–07 (2010).

114. *Id.* at 707 (“[T]he results seem to align PC more with a ‘med-arb’ rather than an ‘arb-med’ hybrid . . . .” (citing Arnold Shienvold, *Hybrid Processes*, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 112, 112–26 (Jay Folberg et al. eds., 2004))).

found in the traditional court process.<sup>115</sup> In sum, the PC process itself actually mirrors a dispute resolution continuum, beginning with education on one end of the spectrum and ending with decisions (the scope of which are usually limited by the court order) that are not made by the parties.

The primary justification for including PC and its relatively coercive potential is that parties at times lack the capacity to resolve their issues in a less coercive process and, therefore, need more assistance and direction. Indeed, by the time they are involved with PC, the parties have often demonstrated this lack of capacity, which may justify being ordered by the court to such a process. In fact, the most coercive intervention—litigation—has not worked for these parties as reflected by their ongoing relitigation efforts. While the potential lessening of self-determination within PC may be appropriate for parties who, at least at times, do not seem to have the capacity to make decisions on their own, the reduced fairness guarantees must also be addressed, particularly in light of the fact that a non-judicial professional is put in a position of authority that can impact fundamental rights of parties.

Any jurisdiction that considers implementing PC as part of its family ADR program must provide fairness safeguards. One approach would be to make PC voluntary, allowing parties to decide whether they will sign up for the process after being fully informed of the PC process and the consequences of entering into it. Once they do sign up, the parenting coordinator's recommendation could be binding. Including a process for obtaining meaningful informed consent will provide for meaningful fairness guarantees. Another approach would be to allow for meaningful judicial review of the coordinator's recommendation, similar to the review conducted of magistrates' or bankruptcy judges' recommendations and the judicial review of party-negotiated marital termination agreements. This approach would likely undermine one of the important benefits of PC, which is to avoid relitigation of issues. Presumably, however, the parties would only challenge the coordinator's decision in extreme cases of disagreement; most of the

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115. Welsh, *Court-Connected*, *supra* note 11, at 130–32 (listing criticisms of arbitration). Indeed, evidence from unpublished in-depth client interviews indicates that some parties who participated in one version of PC felt that the coordinator had unexpected “unchecked power.” Telephone Interview with Professor Bobbi McAdoo, Professor of Law, Hamline Univ. School of Law (Feb. 16, 2012).

issues will be resolved informally without such challenges. It should be noted, however, that one significant limitation of such judicial review is that the judge is most likely to accept and not overturn the PC intervener's judgment. Nonetheless, the potential review of the PC intervener's decision should provide a check on their power.

However approached, simply mandating parties to PC without careful consideration of the impact on fairness and justice is not appropriate.

*C. Beyond ENE and PC: Implications to Other ADR Interventions*

PC and ENE, as well as other interventions, appear to have something in common: they try to meld opportunities for self-determination, such as education and the provision of information, with other process components that tend to be more directive, such as recommendations and reporting, that combined may help to influence the parties' decisions and help them to arrive at an agreement that is best for them. In other words, not only should the various ADR processes be placed along a continuum with different degrees of self-determination and directiveness, such a continuum often exists *within* the ADR processes themselves. A shift from viewing ADR processes within a narrow self-determination versus directiveness–coercion binary and toward a view of the processes (both in comparison to others and internally) along a continuum should provide even more room for innovation.<sup>116</sup>

The level of self-determination allotted to the parties within an ADR process should ideally correlate with the capacity of the parties to self-determine (as long as the parties in fact want to do so); the more capacity the parties have, the more opportunities for self-determination the ADR intervention should allow for. Conversely, the more directive or coercive an intervention is, the larger the concern over fairness and justice must be, as a direct result of the diminished opportunities to self-determine either within the process itself or when entering into the process to begin with. Where concerns of fairness are heightened,

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116. There are also risks inherent to over-expanding ADR options, stemming from a less than clearly drawn line between “‘adjudicative’ and ‘consensual’ categories” and a lack of understanding of the various processes. Nancy A. Welsh, *Integrating “Alternative” Dispute Resolution into Bankruptcy: As Simple (and Pure) as Motherhood and Apple Pie?*, 11 NEV. L.J. 397, 398–99 (2011).

alternative fairness safeguards must be incorporated within the intervention.

Broadly speaking, there are three ways to incorporate such safeguards: by establishing fairness through the design and characteristics of the process itself and through the framing of the role of the intervener, as can be seen in the above discussion of ENE; by providing for a truly non-coercive, fully informed, and consensual opt-in to a more coercive intervention, such as the approach suggested above in the context of the PC discussion and incorporated into the design of ENE in Minnesota;<sup>117</sup> or by guaranteeing meaningful court oversight over the non-judicial, potentially coercive decision, the second approach discussed above under PC.

Assuming that a jurisdiction decides to adopt interventions other than mediation, the question then becomes how to channel parties to the appropriate intervention. This question was the subject of one of the presentations at the conference<sup>118</sup> and will be explored in the next Part within the context of tiered and triage ADR systems.

#### V. MULTI-OPTIONAL ADR SYSTEMS: THE TIERED AND TRIAGE MODELS

If interventions other than mediation—ENE, PC, or any other—are made part of an ADR system, the inquiry then turns to the method of referring parties to the appropriate intervention: who should decide what type of intervention parties will receive<sup>119</sup> and at what point of the

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117. There is, however, some evidence that parties do not always understand the type of process they enter into, even when their participation would be considered voluntary. For example, when interviewing an individual who participated in an ADR intervention in Minnesota in the family context, the interviewee discussed the result in a process she called “mediation” that allowed the neutral to change a judicially approved parenting arrangement without her consent. Whatever ADR process this was, it clearly was not mediation; but the party did not understand what ADR process she had opted into. McAdoo Interview, *supra* note 115. One response to such confusion can be found in the approach taken in Ohio, where the intake officer has a pool of interveners to educate and protect the public from confusion over the various roles ADR interveners can play. Reporter’s Notes, Comments made by Jackie Hagaret at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing “What do Stakeholders Want & Need—Court and Neutrals?”).

118. See Reporter’s Notes, Comments made by Professor Andrew Schepard at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing “Contemporary Practices Meeting These Needs”).

119. Panel Discussion, *supra* note 1, at 823.

process should this decision be made? And in the event the decision is taken out of the hands of the parties themselves, what will be the process for assigning parties to interventions? Mapped onto these questions is the important issue of resource allocation: the effectiveness of an intervention, along with the number of families channeled to a particular intervention, should impact the manner in which funds are allocated to the various forms of intervention within the system.

These questions will be looked at by comparing a tiered approach (where the parties usually start with educational programs, then go to mediation, and progress to more directive and potentially intrusive interventions) to the innovative triage approach (where parties are channeled to what is deemed to be the appropriate intervention out of a variety of interventions) that was presented at the conference.

Both tiered and triage—multi-optional ADR programs—provide a menu of interventions in addition to mediation and tend to have a relatively robust level of institutional support.<sup>120</sup> Under one example of a tiered system in the family context, the parties are first provided with a divorce education program and then sent to mandatory mediation.<sup>121</sup> If mediation does not result in a settlement, then the parties are escalated to the next intervention.<sup>122</sup> The interventions progress from the least intrusive and most supportive of self-determination—mediation—to gradually more intensive and directive options<sup>123</sup> that tend to lessen parties' levels of self-determination.

As under a tiered system, triaging<sup>124</sup> (or differentiated case management<sup>125</sup>) consists of ADR interventions with varying levels of

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120. Connecticut, where a triage approach is used, is considered an innovator and leader in dispute resolution processes and in addressing the complex challenges of families involved in parenting disputes. Salem et al., *supra* note 14, at 748. In California, where the tiered approach is used, a unified family court system has been in place for many years. See JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, UNIFIED COURTS FOR FAMILIES PROGRAM: MENTOR COURT PROJECT 8–10 (2007), available at <http://www.courts.ca.gov/documents/UCFEDITFinal-online.pdf>. The Northern District of California also has a sophisticated triage approach in the civil litigation context. Brazil, *supra* note 24, at 111.

121. McIsaac, *supra* note 63, at 192; Salem et al., *supra* note 14, at 750–51.

122. McIsaac, *supra* note 63, at 192.

123. See Salem et al., *supra* note 14, at 750; Salem, *supra* note 19, at 371–73, 745.

124. See Salem, *supra* note 19, at 371 (“In recent years, a handful of family court service agencies, including those in Connecticut, Arizona and British Columbia, have begun to explore variations of triage, or differentiated case management, as an alternative service delivery model. Triage proponents suggest a departure from the common practice of

self-determination opportunities and varying levels of directiveness, such as providing information, pressuring to settle, predicting court outcomes, and some or all of the above. The significant addition under the triage approach is the inclusion of a screening process that is meant to channel the parties to the more appropriate intervention based on the needs and capacities of the parties.<sup>126</sup> In Connecticut, as one example of a triage approach in the family context, court counselors may recommend that parties attend mediation, a confidential conflict resolution conference, an issue-focused evaluation, or a comprehensive evaluation, a determination made based on the information collected in this initial intake interview.<sup>127</sup> Parties that do not agree with a service recommendation may contest it, but they rarely do.<sup>128</sup>

*A. Balancing Considerations of Administrative Efficiency and Party Benefits*

The tiered and triage approaches in the family context do not differ (at least in theory) over the need to screen for domestic violence or for cases where one or both of the parties lack the necessary capacity due to high levels of substance abuse or mental illness.<sup>129</sup> The real distinction between the two approaches relates to the method of referring parties to particular ADR interventions at the beginning of their involvement with the court. Specifically, the two systems differ in how they approach high-conflict parties that are deemed to have a diminished capacity to work together in a voluntary setting but have no other prohibitive capacity limitations. Under the tiered approach, such parties will be mandated to mediation to maximize their opportunity to self-determine

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referring all parents to mediation.”).

125. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 113–17 (2004).

126. In Connecticut, for example, the triage process starts with a confidential screening interview. “The Family Civil Intake Screen contains questions in six domains: (1) General Information; (2) Level of Conflict; (3) Ability to Cooperate and Communicate; (4) Complexity of Issues; (5) Level of Dangerousness; and (6) Disparity of Facts/Need for Corroborating Information.” Salem et al., *supra* note 14, at 758.

127. “No single question is intended to determine specific services; however, there are key questions about violence and safety that may trigger specific interventions.” Salem et al., *supra* note 14, at 758.

128. Salem, *supra* note 19, at 380.

129. See Salem, *Response*, *supra* note 84, at 202 (stating that “[s]creening for concerns related to domestic violence and other safety-related issues has been standard operating procedure for many court mediation programs for years”).

prior to being assigned to other, more “directive and intrusive” ADR interventions.<sup>130</sup> Under a triage approach, some of these cases will be diverted from mandatory mediation through a screening process.<sup>131</sup>

Underlying these two different approaches is a debate over how to balance between the effective use of court resources and the relative benefit to the parties. Proponents of the triage approach argue that diverting parties who are less likely to benefit from mediation will free up resources for higher quality mediation<sup>132</sup> and other interventions that are deemed to be more effective for particular parties and circumstances.<sup>133</sup> They also argue that mandating parties to mediation in inappropriate cases may harm the parties due to the impact on the parties’ resources and due to the possibility that a failed intervention may actually escalate the dispute between the parties.<sup>134</sup>

Proponents of mandatory mediation within a tiered system counter that there is no effective way to properly predetermine whether mediation can be helpful to high-conflict parties.<sup>135</sup> They further argue that many high-conflict parties that initially resist mediation end up tremendously benefiting from maximizing their opportunity to self-determine, which justifies mandating all appropriate high-conflict cases to mediation.<sup>136</sup> Indeed, not sending all parties to mediation would result in inappropriately excluding at least some parties from mediation and unduly minimizing their opportunities for self-determination.<sup>137</sup> Therefore, according to proponents of the tiered approach, there is insufficient justification for diverting parties and funds from mediation to other processes, and in fact the opposite may be true.

The difference between the two approaches seems to boil down to whether to risk erring on the side of over- or under-inclusion. Under the triage approach, there is a potential for under-including parties in mediation. Proponents of this approach are willing to take this risk, arguing that a principled and sound method for allocating parties to the

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130. Salem et al., *supra* note 14, at 757–60.

131. Salem, *supra* note 19, at 380.

132. See *infra* Part V.B–C.

133. See *infra* Part V.B–C.

134. Salem et al., *supra* note 14, at 750 (stating that parties “often becom[e] increasingly polarized through repeated failed attempts to resolve their disputes”).

135. McIsaac, *supra* note 63, at 193; Salem, *supra* note 19, at 372.

136. McIsaac, *supra* note 63, at 190–93.

137. See *supra* note 62 for a brief discussion of mandatory mediation.

appropriate intervention can be designed to diminish the level of under-inclusion. While the risk of under-inclusion is diminished in this manner, the payoff is significant and worthwhile: screening would allow for a better allocation of the resources saved toward other interventions and mediation improvements, which would enhance the system as a whole.<sup>138</sup> Under the tiered approach, on the other hand, there is the potential, almost the certainty, of offering mediation to parties that cannot benefit from it, but proponents of the tiered approach believe that it is difficult to predetermine who can or cannot benefit from mediation.<sup>139</sup> They place a higher value on maximizing opportunities of self-determination at the risk of over-inclusion.<sup>140</sup> They also doubt that it is possible to appropriately prescribe the right intervention under the triage approach, arguing that the risk of under-inclusion is higher than suggested by triage proponents.<sup>141</sup>

### B. Considerations of Fairness in the Assignment Process

Striking the right balance between the benefits derived by the parties and the efficient use of scarce funds is one piece of the puzzle, while fairness to the parties is the other. Within an ADR system there are three layers where coercion can take place. The first is in the design of the intervention itself, which will dictate whether the intervention will tend to be directive or even potentially coercive (as discussed above in the context of mediation, ENE, and PC).<sup>142</sup> The second is the manner in which the intervention is actually practiced and the related procedural justice implications, regardless of the original intent behind the design of the process (as discussed above in the context of mediation).<sup>143</sup> The third, addressed below, is the manner in which parties are assigned to a process. As to the last, how can this important decision be made in a manner that takes into account fairness considerations? More specifically, who should determine where the parties end up: a judge, court administrator, service provider, or perhaps the parties themselves?

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138. Salem, *Response*, *supra* note 84, at 202.

139. See McIsaac, *supra* note 63, at 193 (stating that “[t]riage places a most difficult burden upon the triage worker to predict the future whether or not the family can successfully mediate” and in the difficult position of “predicting the future”).

140. *Id.* at 192–93.

141. See McIsaac, *supra* note 63, at 193.

142. See *supra* Parts III.A & IV.A–B.

143. See *supra* Part III.A.



In the tiered system, parties that do not settle through mandatory mediation appear before a judge who has the discretion to mandate that the parties engage in a different, potentially coercive ADR process. The fact that a judge is the one mandating the parties to a different process falls in line with how the judge's authority to manage cases is currently understood; however, this type of authority raises some broad concerns that parties will be mandated to surrogate judges that are not bound by the same standards and considerations of a judge assigned to their role through a democratic process.<sup>144</sup>

In the family triage system, the fairness concerns in the manner of assignment focus on the intake screening process. Presumably, a non-judicial professional will have at the very least the informal power to direct parties to a process that is non-voluntary and potentially coercive.<sup>145</sup> The assignment to such a process by a non-judicial professional is significant in light of the fact that it may directly impact the determination of the parties' legal rights.<sup>146</sup>

One approach to resolving this problem is the one adopted by proponents of the family triage program in Connecticut.<sup>147</sup> The assignment method in Connecticut provides for a transparent, objective, and vetted process for screening that can include the parties' own input and that also provides for a meaningful opportunity to challenge the ADR assignment.<sup>148</sup> However, there is one significant limitation to this approach: while there is a right to appeal the screener's recommendation,<sup>149</sup> it is safe to presume that mere dissatisfaction with being assigned to an intervention process due to its relatively coercive

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144. Welsh, *Court-Connected*, *supra* note 11, at 122–24, 134–35, 141–43.

145. McIsaac, *supra* note 63, at 193.

146. *Id.* (stating that triage function will not be subject to review and therefore will be part of a process that “Laura Nader termed a ‘micro-legal process’ without safeguards”)

147. Salem, *supra* note 19, at 380 (stating that “[i]n Connecticut, the screening interview is confidential, after which family court counselors recommend that parties participate in mediation, confidential conflict resolution conference, an issue-focused evaluation or comprehensive evaluation. Parties who do not agree with a recommendation may contest it to the court; in practice, however, agency administrators report virtually universal acceptance of the counselor service recommendations”).

148. *Id.* at 383 (stating that “[a]dmittedly, a major flaw exists in the case for replacing tiered services models with a triage system: it is predicated on accurate, easy to administer, replicable methods of predicting the most appropriate service for each family. At this time no such method exists, but there is work that points us in the right direction”).

149. *Id.* at 380.

nature will not provide sufficient grounds for appeal. In other words, the full consent of the parties does not appear to be a prerequisite for assignment.

The simplest solution to the fairness dilemmas raised under either the tiered or triage approaches discussed so far would be to allow the parties themselves to select the process they want, after they fully understand the different options.<sup>150</sup> Such an approach will likely result in at least some parties not selecting the process that would benefit them most (as would be determined by a third party who can presumably do so effectively) or selecting a less effective process, resulting in a waste of scarce public funds. It also may result in parties trying to “game the system” by opting for a process that they believe will most benefit them, and it would require a tie-breaker for times when parties select different processes. Finally, it diminishes the authority of the court to manage cases and does not take into account the lessened level of autonomy of those who put themselves under the authority of the court by seeking the court’s intervention. In short, while making the assignment voluntary may provide robust fairness guarantees, it will also potentially undermine the effectiveness of the ADR program and the authority of the court. Nonetheless, this is an approach that must be considered because of its heightened guarantees of fairness and because it is consistent with the idea that plaintiffs get to choose to go to court and, therefore, should be allowed to opt out of the traditional court setting rather than being forced to do so.

A different approach for assignment found in the ADR program established in the Northern District of California provides an interesting variation to the previous two approaches so far discussed. In the Northern District of California’s civil ADR program, the ADR system consists of problem-solving mediation, ENE, non-binding arbitration, and judicially hosted settlement conferences.<sup>151</sup> When designing the ADR system, the court explicitly addressed the important questions of the role of the parties and counsel in deciding whether to use ADR and

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150. Reporter’s Notes, Comments made by Professor John Lande at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing “Core Values of Dispute Resolution—Is Neutrality Necessary?”); Nolan-Haley, *supra* note 67, at 778–79 (discussing the need for informed consent to guarantee fairness).

151. Smith & Martinez, *supra* note 7, at 146 (citing *Alternative Dispute Resolution (ADR)*, U.S. DIST. CT. N. DIST. OF CAL., <http://www.cand.uscourts.gov/adr> (last visited Jan. 22, 2012)).

in selecting an ADR process, and the degree the court should encourage or coerce parties into an ADR process in the event they cannot select a process on their own.<sup>152</sup> In response to these questions, a multi-step assignment process was conceived. The process first requires that the attorneys educate their clients about the ADR options and that the attorneys meet and confer with the other side.<sup>153</sup> The parties may customize any of the processes they select.<sup>154</sup> If this selection process fails, the parties are required to participate in an “ADR conference” with the court’s ADR staff. If the parties still cannot agree on a process, the ADR administrator either recommends a process to the judge or recommends that the parties do not engage in ADR. The goals of this assignment process are to engage the conflict stakeholders in the process of determining the appropriate intervention for them.<sup>155</sup> While ultimately the assignment decision may be taken out of the hands of the parties and their lawyers, this is done as a last step, which is more “just” both procedurally and substantively.<sup>156</sup>

The approach assumed in the Northern District of California can be labeled as a triage approach: ultimately, a court employee will make a recommendation to the court, which in turn has the authority to bind the parties to a particular process. However, the process of assignment *itself* is, in fact, tiered: the manner of assignment to the ADR process progresses from the least coercive approach, allowing the parties to make their own process choice, to a more coercive one, where the court, pursuant to a recommendation made by a court administrator, makes the decision for the parties. While the tiered assignment approach is

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152. Smith & Martinez, *supra* note 7, at 147. See generally N. DIST. OF CAL., DISPUTE RESOLUTION PROCEDURES HANDBOOK 15 (2005), available at <http://www.cand.uscourts.gov/overview> (follow “Dispute Resolution Procedures” hyperlink).

153. Smith & Martinez, *supra* note 7, at 147.

154. See Riskin & Welsh, *supra* note 70, at 863, 903 (citing N. DIST. OF CAL., *supra* note 152, at 15).

155. N. DIST. CAL., *supra* note 152, at 129.

156. Indeed, professors Nancy Welsh and Andrea Schneider suggest in a forthcoming article currently titled *Of Fireworks and Flames: Considering the Lessons of Dispute System Design and Procedural Justice in Using Mediation to Resolve Disputes in Investor-State Relations*, PENN. ST. J.L. & INT’L AFF. (forthcoming 2012), that at least in the context of mediation, parties are more likely to perceive the decision to order the use of mediation to be more procedurally just if they received the opportunity for voice, consideration, and even-handed and dignified treatment during the decision-making process that led to being mandated to mediation. See E-mail from Professor Nancy A. Welsh, Penn. State Law School, to author (Feb. 22, 2012, 20:57 EST).

superior to an assignment process that takes the decision completely out of the hands of the stakeholders, it is also potentially resource intensive and will require adaptation to other contexts such as the family one, where most parties are not represented. Nonetheless, it offers a valuable lesson about how one might approach the design of an assignment process itself: it can be designed to include stages along a continuum, where the parties initially might get the opportunity to self-determine what process to participate in and gradually move onto more coercive methods of assignment.

### *C. The Importance and Limitations of Empirical Research*

One important way to determine whether one intervention or ADR system is preferred over others is through empirical research. Data derived from such research can serve to justify allocating resources to particular interventions or ADR systems—tiered, triage, or any other variant—as a whole.

There are a number of challenges to conducting such research. To obtain the best comparative results, assignment to interventions would have to be random and the impact of interventions would have to be measured over time. Such random assignment has the potential of harming some of the families that end up with the less effective or suitable intervention for them. It should therefore come as no surprise that, from a practical standpoint, it is difficult, but not impossible, to get courts to agree to implement random assignment experiments.<sup>157</sup> An alternative method of obtaining good comparative results would be to demonstrate that the characteristics of individuals in different ADR processes are the same.

An additional challenge is that empirical research requires that funds be diverted toward pilot programs and away from existing programs, which again raises questions of priorities in resource allocation. This concern is somewhat tempered within programs where staff are already made responsible for conducting empirical research. An additional challenge is that jurisdictions, and even courts within the

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157. For two such widely discussed studies, see WAYNE KOBBERVIG, MN. JUDICIAL CTR., *MEDIATION OF CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION* (1991); Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING AND CLINICAL PSYCHOL. 323 (2001).

same jurisdiction, may vary widely in a number of dimensions that may impact the applicability of the results to other jurisdictions.

The design of the research itself is a separate and serious issue because research requires an agreement about which measures should matter. To name a few potential areas of measurement: self-determinism, efficient resource use, authority of the court, resulting agreement rates, party satisfaction, procedural justice perceptions, which process leads to more efficient use of court time, and any mix of the above. The data relevant to any of these measurements is difficult to obtain; what is to be measured is even more difficult for multiple stakeholders to agree upon.

While implementing empirical research can be challenging, more empirical research is essential, as well as other research approaches. Such research can have more modest goals of measuring the short-term impact of interventions, as well as the perception of the parties about whether they were well-served by a particular intervention.<sup>158</sup> Additionally, focus groups, interviews, and other kinds of qualitative research should also be considered for gathering information about what works and why. The different approaches to research—empirical and otherwise—can provide jurisdictions that seek to make immediate or long-term reforms with guidance regarding the types of ADR modules that work best.

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So far, this Report has focused on providing a framework for discussing the goals of court ADR systems. This discussion largely mirrors the first day of the conference. The next Part of the Report will focus on some of the considerations that go into the actual design and implementation process of ADR systems, which was primarily focused on during the second day of the conference.

The conference attendants were cognizant of the fact that jurisdictions have various cultures (both legal and otherwise), various institutional needs and constraints, and are at various stages of evolution or, sadly, devolution. The assumption therefore was that there cannot be a uniformly ideal ADR program, nor can there be a uniform process for designing and implementing such a system. Nonetheless, there were common elements that the conference attendees highlighted that will be

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158. See, e.g., McAdoo, Welsh & Wissler, *supra* note 38, at 8.

useful to jurisdictions evaluating their specific programs and considering reform.

The next Part of the Report will outline some practical steps to promote, design, implement, and reform ADR programs.<sup>159</sup> The following section is based almost entirely on what the conference participants spoke about as recorded within notes taken by the conference reporters, transcripts of the first day of the conference, and short, informal reports drafted by the five groups convened during the second day of the conference.

## VI. THE DESIGN AND IMPLEMENTATION OF ADR SYSTEMS

A number of jurisdictions have successfully implemented ADR programs and should be looked to as models as a whole or for specific strategies that worked.<sup>160</sup> The first required step is to initiate the process for reforming or implementing an ADR program. The second is the process of reform or design itself. The last is ensuring the longevity of the ADR program.

### A. *Setting the Stage for ADR*

Before approaching the question of how to either design an appropriate ADR program or reform an existing one<sup>161</sup> (initiatives that share common characteristics but also diverge in others), support for such an agenda must be in place. Without this needed support, there will be no political will or there will not be the resources needed for a successful design and implementation of an ADR program.

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159. The following are some useful resources for those interested in reading more about the process of designing an ADR system: John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002) (discussing Dispute System Design (DSD)); Bobbi McAdoo & Nancy Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1 (Donna Stienstra & Susan M. Yates eds., 2004) [hereinafter McAdoo & Welsh, *Aiming*]; McAdoo, Welsh & Wissler, *supra* note 38 (discussing design of mediation); Smith & Martinez, *supra* note 7.

160. Some of these jurisdictions include: California, Connecticut, Florida, Ohio, Minnesota, Maryland, New York, British Columbia, and Arizona. See SHEILA M. GUTTERMAN ET AL., *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 7 n.18 (2004).

161. At this point, most systems are not designed from scratch and operate within an existing framework. Smith & Martinez, *supra* note 7, at 125.

Such support should come from the broadest range of sources possible: regular citizens who use the system; grassroots, community leaders, preferably with political clout; organized networks within the bar, such as legal-services lawyers, and other professional associations, such as chambers of commerce, ADR associations, and consumer and family advocacy groups; court administrators; legislators; and perhaps most importantly, knowledgeable, energetic, politically savvy, and passionate judges. It is most crucial to identify an individual or individuals within the court system, who can champion ADR and are willing to function as a repository for data and promotion efforts.<sup>162</sup>

Some important tools for gaining such support are lobbying, outreach, education, and training. Particular attention has to be placed on the bench and bar. Without the appropriate “buy-in” from lawyers and judges, the ADR processes will likely lose their distinction from the traditional adversarial system, and in fact simply blend into the adversarial system that ADR was meant to be the alternative to.<sup>163</sup> One approach suggested in the conference was offering “value-changing” training opportunities that are attractive to judges and lawyers; these individuals can impact attitudes within the bench and the bar in a manner that may have broad institutional implications.<sup>164</sup> It is also important to include informal relationship-building efforts, such as going to lunch, developing friendships, and more generally, partaking in real conversations with leaders of the various stakeholding groups. Creating documents that contain clear budget rationales that draw on research and evaluation and summarize data to make the case for ADR can also significantly help. Such materials cannot focus solely on narrow judicial economy considerations, otherwise ADR will be adopted for these reasons and no others; the materials should be used to educate stakeholders about the broader goals and benefits derived from these

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162. Reporter’s Notes, Think Tank Four at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 24, 2011) [hereinafter Think Tank Four].

163. Panel Discussion, *supra* note 1, at 807–08 (quoting WALDMAN, *supra* note 25, at 117–18) (stating that currently, the biggest critique of mediation, the most prominent form of ADR, is that it is becoming more and more like the adjudicative process it was meant to be an alternative to); *see also* Welsh, *Court-Connected*, *supra* note 11, at 137–40; Welsh, *Thinning Vision*, *supra* note 20, at 25–26. For an illustration of shifts in institutional attitudes toward a broader understanding, appreciation, and implementation of ADR, *see* Brazil, *supra* note 24, at 110–14.

164. Think Tank Four, *supra* note 162.

goals, not only to parties but also to lawyers, judges, and even to society as a whole. There are a number of materials already in place that can be relied on for such purposes.<sup>165</sup>

### B. Who Should Convene the Process?

To initiate the actual process of designing or reforming an ADR program, someone or some institution has to assume responsibility for the deliberative process and for identifying and convening stakeholders.<sup>166</sup> One effective convener might be a sympathetic judge with sufficient clout. Some examples of successful “Judge as Convener” scenarios can be found in the Florida, Maryland, and New York processes. In Maryland, the Honorable Robert M. Bell, Chief Judge of the Maryland Court of Appeals, created the Maryland ADR Commission in 1998, charging it with “advancing the appropriate use of mediation and other innovative conflict resolution processes throughout Maryland’s courts.”<sup>167</sup> ADR Florida, another example of a long-standing and robust program, received widespread support from the judiciary.<sup>168</sup> In New York, Chief Judge Judith Kaye pushed for and achieved the reform of the family court system in general, which included a significant ADR component.<sup>169</sup>

165. See Bobbi McAdoo & Nancy Welsh, *The ABCs of ADR: Making ADR Work in Your Court System*, JUDGES J., Winter 1998, at 11; McAdoo & Welsh, *Aiming*, *supra* note 159.

166. Reporter’s Notes, Think Tank One at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 24, 2011) (discussing the design of a process to develop, reform or enhance services in family disputes).

167. See *MACRO’s History*, MD. AND CONFLICT RESOLUTION OFFICE (MACRO), MD. COURTS.GOV, <http://www.courts.state.md.us/macro/history.html> (last visited Apr. 4, 2012) [hereinafter MACRO].

168. Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1042–46 (1993).

169. Often general court reform in the family arena, such as establishment of a Unified Family Court, also entails significant ADR reform, as was the case in New York. For a comprehensive description of the New York reform initiative that included the implementation of ADR led by Chief Judge Judith S. Kaye, see Judith S. Kaye & Jonathan Lippman, *New York State Unified Court System: Family Justice Program*, 36 FAM. & CONCILIATION COURTS REV. 144, 144 (1998) (describing a “comprehensive, forward-looking strategy to address the family justice issues of today and tomorrow”).



### C. Initial Goal-Setting

The “designer of the system has the power to define the goals of that system” and set the priorities.<sup>170</sup> As noted above in detail, there is often a “significant tension” between “the goals of efficiency and fairness or justice.”<sup>171</sup> Clear objectives for the process that take this tension into account must be identified and defined: what types of conflicts the system seeks to address; what goals the system as a whole intends to accomplish; and what goals each intervention within the system intends to accomplish.<sup>172</sup> The initial goals may be framed by the convener in consultation with ADR system design experts.<sup>173</sup> However, these goals cannot be rigid because they may, and in fact should, shift once the voices of the various stakeholders are included, which is a critical part of the deliberative process itself.<sup>174</sup> Alternatively, the goals can be set quite broadly (i.e., to examine the state of ADR and reform it) and the convening process itself can set out to define the specific goals of the process.<sup>175</sup>

### D. Identifying the Stakeholders

The next crucial step is to figure out an inclusive way for deciding who should be part of the discussion that ultimately will shape the ADR system.<sup>176</sup> Identifying and inviting the appropriate stakeholders requires a separate, thoughtful process. Within the process of identifying the stakeholders, it is important to keep in mind that while there are multiple stakeholders, they do not have equal stakes.<sup>177</sup> The stakes are

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170. Smith & Martinez, *supra* note 7, at 130 (footnote omitted).

171. *Id.*

172. *Id.* at 129–30.

173. This is the process similar to the one that took place in Connecticut when it reformed its family ADR program to a triage approach. Salem et al., *supra* note 14, at 748–57.

174. Smith & Martinez, *supra* note 7, at 131 (stating that “[s]ystem dysfunction can often be attributed to failure to adequately involve and acknowledge the interests of key stakeholder groups”).

175. See MACRO, *supra* note 167 (“Working with over 700 people around the state, the ADR Commission developed a consensus-based Practical Action Plan titled *Join the Resolution*.”). This Practical Action Plan is still in effect in Maryland. See *id.*

176. Smith & Martinez, *supra* note 7, at 131.

177. See Reporter’s Notes, Comments made by Stacey Platt at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) [hereinafter Platt Comments] (discussing “What Do Stakeholders Want & Need—

probably highest for those that do not have the resources that would allow them to access services. These stakeholders also have the least leverage to influence the design of the ADR program. Therefore, identifying and including party-surrogates—such as Domestic Violence (DV) advocates, attorneys for the child, and legal aid attorneys—is essential.

### *E. The Design Process*

The process of how the final decisions will be made with regard to the shape of the proposed ADR program must be clearly defined. A consensus-building process that includes a broad committee with representatives from all of the important stakeholder groups may be lengthy, but it will also ensure broad-based support that is more likely to provide long-term stability.<sup>178</sup> A different approach, which may be more efficient and appropriate in other jurisdictions, would be to require that the individuals assigned with the task of designing the ADR program gather the various perspectives and synthesize them into a coherent recommendation that takes the various gathered perspectives into account.<sup>179</sup> Either approach will also require political buy-in.

The ADR committee members, whether consisting of a large group of stakeholder representatives or a smaller committee, must understand the various perspectives and needs of their counterparts and how they may be impacted by the proposals that are to be evaluated. Particularly where changes to an existing program are involved, there is a need to understand the evolution of the system that is already in place: what is working, what is not working, and why it is or is not working. Similarly, identifying who may be invested in the status quo and how to overcome resistance to change is also a critical step. Probably most critical to the design or reform of a new ADR program is identifying and responding to the existing institutional constraints, such as legislative and budgetary ones.<sup>180</sup>

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Parties & Lawyers?”).

178. See, e.g., MACRO, *supra* note 167.

179. Smith & Martinez, *supra* note 7, at 146–47 (discussing reforms made in the Northern District of California ADR program).

180. *Id.* at 131–32.

*F. Underrepresented Stakeholders*

Conference attendants emphasized some of the considerations that apply to those who tend to have the least voice in the process design, such as pro se litigants, poor litigants, and often those who are both; children; and domestic violence victims. Including the considerations of those who are impacted most by the ADR system and yet lack the opportunity to participate in the system design process is essential. Indeed, the process design itself is a significant juncture and where self-determination takes place.<sup>181</sup> While this Report does not attempt to summarize all of the possible considerations that may impact the design of an ADR system, it will include a brief discussion of the underrepresented stakeholders that were emphasized by conference attendees.

*1. Children*

Although children are often not designated as parties in many family ADR processes, the process may have the most significant impact on them, even more significant than on the adult parties to the conflict themselves, usually parents or legal guardians. Moreover, the state has a particular responsibility toward children; while parental rights are strongly valued and constitutionally protected, such rights are tempered by the state's responsibility to guarantee the well-being of children.

From a child's perspective it is often (but certainly not always) best to settle early, before the court gets fully involved and the conflict becomes increasingly adversarial.<sup>182</sup> In addition, durable solutions are also important to the well-being of the child. For these reasons, litigation is often the least helpful process for children; it tends to last longer and can increase the level of conflict and relitigation. Therefore, front-loading ADR services—services that may lead to quick and durable agreements and stable environments—would benefit children

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181. See Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 2–5 (2009) (arguing that where party-stakeholders have no say in the design process, the intervention itself should provide for heightened guarantees of self-determination, as is the case with USPS's REDRESS program where transformative mediation is utilized). The design process is a fourth layer of an ADR system where self-determination can play an important role. The other three are the characteristics of the intervention itself, how it is actually practiced regardless of the intended goals, and the manner in which parties are assigned to a given ADR process. See *supra* Part V.B.

182. Platt Comments, *supra* note 177.

most. At the same time, it is essential that family ADR systems recognize that litigation is sometimes the only way to achieve finality and durability for the children and systems must be designed to respond to these circumstances as well.<sup>183</sup> Moreover, settling early should not be done simply to expedite decisions and without fully investigating abuse, neglect, or both; DV; or other issues that may place a child in harm's way.<sup>184</sup>

Finding a way to include the voice of the children within the ADR process is also important. There are risks involved in directly including children in court or ADR processes, but this does not mean that these risks should negate the importance of including children's voices, particularly because there are ways to minimize the risks.<sup>185</sup> Once again, the concept of a continuum can be helpful: the question of child inclusion does not have to be binary, either good or bad, but rather can be examined in terms of degrees, allowing for a convergence between the need to protect and to include children. Including a legal representative of the child within the ADR intervention is one example of an intermediate approach, which requires that courts appropriately fund attorneys for children and fund their participation in the ADR intervention. ADR interventions can also be designed to either center on the child's needs or to include the actual voice of the child, either directly or through a professional trained to do so, which is the practice within some existing and innovative approaches to child-focused mediation.<sup>186</sup>

## 2. Low Income and Pro Se Litigants

Conference participants identified the following considerations that might apply to low income litigants, pro se litigants, or those who are both.<sup>187</sup> First, the ADR system must include incentives for pro bono

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183. *Id.*

184. *Id.*

185. *Id.*

186. See Jennifer E. McIntosh et al., *Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment*, 46 FAM. CT. REV. 105, 105 (2008); Comments made by Loraine Martin at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing “What Do Stakeholders Want & Need—Lawyers and Parties?”).

187. Reporter's Notes, Think Tanks Two and Three at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing “Impact of Socio-Economic Status” and “Self Represented and Unrepresented

dispute resolution services. Similarly, a rethinking of fee structures must be considered in order to allow dispute resolution services to be provided to all parties across the board.<sup>188</sup> This may involve charging families what they can afford in a sliding-scale model. Second, the system must be designed to provide information, particularly to pro se litigants.<sup>189</sup> The areas of information that need to be covered for informed choice-making should include the process itself, the substantive legal issues, and the impact of a given decision on the respective parties' rights. Indeed, the degree of self-determination is limited where the parties do not understand both the ADR process and how it operates within the broader court system, regardless of how well an intervention is designed.<sup>190</sup> Third, a variety of ADR interventions, not just mediation, should be expanded to underserved jurisdictions, and the interventions must be targeted to match the parties' needs in order to ensure that these parties' resources—time, money, and emotional resources—are conserved. Along these lines, a more comprehensive suggestion made during the conference was to convene and facilitate a public policy discussion on justice that would name the inequities, and identify related positive and negative characteristics in ADR and in the courts. Fourth, parties should be getting some form of emotional support to help them through very difficult processes. Integrating therapeutic and interdisciplinary approaches within the family law system can have a major impact on this front. Overall, active steps should be taken to ensure that parties are not overwhelmed by the power of the system. Special care must be taken to ensure that parties who lack resources are not overwhelmed by the professionals who have a preexisting relationship with each other.<sup>191</sup>

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Litigants").

188. This approach is not the only way to deal with the costs of ADR programs. Including court staff as neutrals, as well as judges performing ADR services, can alleviate the financial costs of participating in ADR interventions.

189. Macfarlane, *supra* note 31, at 936–39.

190. *See, e.g.*, Reporter's Notes, Comments made by Judge Michael J. Dwyer at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing "What Do Stakeholders Want & Need—Court and Neutrals?"); Reporter's Notes, Comments made by David Levin at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing "What Do Stakeholders Want & Need—Court and Neutrals?"); McMullen Comments, *supra* note 53.

191. Mayer Comments, *supra* note 73.

### 3. Domestic Violence

The example of the DV advocates' response to mediation can illustrate the importance of including DV advocates as stakeholders in the design process of any family ADR intervention or system. Initially, DV advocates opposed mediation where DV was present because they were concerned that individuals suffering from DV would be coerced into agreements that were not good for them.<sup>192</sup> They were also concerned over the possibility that victims will be re-victimized by being in the same room as the offender and by being forced to engage with the offender directly; for the physical safety of the victim during, before, and after mediation; and that the mediation itself could lead to more violence.<sup>193</sup>

Much has been written and can be said about DV in the context of family cases, and family ADR in particular. The following is a very modest attempt at summarizing the elements of a broad framework for safe management of DV cases in family ADR (many of which might apply to areas outside the ADR context).<sup>194</sup> Family ADR programs should provide thorough training to those who work within them: judges, lawyers, court administrators, and ADR interveners. Such programs should implement a meaningful<sup>195</sup> screening process that: (1) identifies incidents of violent acts and other types of coercion; (2) analyzes the characteristics of such instances, differentiating between

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192. See Rene Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 96–100 (2001) (summarizing the arguments against mandatory mediation in cases that involve domestic violence).

193. *Id.*

194. For a more detailed discussion of DV and ADR, see Nancy Ver Steegh, Gabrielle Davis & Loretta Frederick, *Look Before You Leap: Court System Triage of Family Law Cases Involving Intimate Partner Violence*, 95 MARQ. L. REV. 955, 968–71(2012); see also Nancy Ver Steegh & Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts*, 46 FAM. CT. REV. 454, 460 (2008).

195. Questions about our current ability to quickly and reliably identify cases and understand the implications of domestic violence for the purpose of decision-making about participation in a dispute resolution process persist. See Ver Steegh, Davis & Frederick, *supra* note 194 at 987–88 (concluding that while court-connected triage poses problems, so does the status quo under the linear, or tiered, approach); Ver Steegh & Dalton, *supra* note 194, at 460. Moreover, if proper and thorough screening is viewed as a condition precedent for safe management of DV cases, what margin of error are we willing to accept? Ver Steegh, Davis & Frederick, *supra* note 194, at 965–66 (illustrating hypothetically how triage can have a potentially major negative impact on victims of domestic violence)

the various types of DV and determining the implications of these differences; (3) assesses the parties' realistic options in light of this analysis; and (4) channels DV cases to the appropriate intervention by allowing the parties to make their own informed choices regarding the type of court intervention they will receive, ADR or otherwise.<sup>196</sup> Moreover, ADR programs must provide DV victims with interventions that first and foremost create a safe environment where the danger of coercion by the offender is negated but also that do not exasperate the risks inherent in DV cases, such as increased future violence. Finally, such programs must provide referrals to other resources that might be needed. This brief outline of a framework is only meant to reiterate how proper treatment of the issue requires a deep understanding of the problem and dedication of the right resources.

### *G. Ensuring Longevity*

One way to promote the longevity of ADR programs is to convene a design or reform process like the one described above. Such a process is likely to result in broad-based support for ADR programs with clearly defined goals, to strike a balance between the various perspectives and often competing goals, and to lead to a stable funding source and authorizing legislation. However, legislators, court administrators, and financial realities change, so continuing efforts of lobbying and education will always be necessary. Validating the programs through research—in terms of the level of the parties' satisfaction, fairness, and efficient use of resources, to name a few key areas—is essential. Conversely, not being afraid to change, improve, or even abandon programs that do not work effectively is also important.

## VII. LOOKING FORWARD

Parties in dispute that enter the court system do so out of necessity, due to their inability to resolve their issues on their own. As a consequence they give up a certain level of their autonomy. In the family arena, parents may lose some control over their private family arrangements as a result of the court's authority and responsibility to

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196. Ver Steegh, Davis & Frederick, *supra* note 194, at 989–91. Allowing parties with a history of DV to make their own choice appears to be in tension with the assignment process under either the tiered or triage approaches, which may assign or decline to assign parties to a process without the appropriate level of consideration needed in cases that involve DV. *Id.* at 986–87 (discussing party self-determination in the context of process choice).

ensure the best interest and welfare of children. In the civil arena, parties may be forced to leave their home, give up on a family business, or lose their financial autonomy. While parties give up a certain level of their autonomy, often the best resolutions of disputes are those shaped by the parties themselves.<sup>197</sup> The courts must play a significant role in providing parties with adequate services that lead to appropriate resolutions, whether through ADR or otherwise.<sup>198</sup> Courts have a responsibility to ensure that the parties they serve get the right kind of intervention and of the highest quality.<sup>199</sup> Courts also are responsible for guaranteeing that the ADR interventions they sanction provide for guarantees of fairness and justice. Overall, this requires that courts ensure that ADR programs are properly designed, funded, assessed, regulated, and supervised.

The primary barriers to the broad implementation of such programs can be summarized as follows: first and foremost, a lack of financial support and, second, a lack of clarity in defining the goals of court ADR—goals that need to strike an appropriate balance between fairness, justice, effectiveness, benefits to the parties, and efficiency. More generally, an investment in the status quo—by judges, attorneys, and even at times by ADR administrators and neutrals—is hindering the needed changes from taking place.

The conference and this Report are just the beginning of a much broader effort to expand and reform court ADR. The following are some practical steps—all of which were either mentioned explicitly by conference participants or directly derived from their comments—that can be taken in support of such important efforts.

#### A. On a National Level

Uniform efforts, such as lobbying for federal legislation that would encourage the development of ADR programs, can have an impact across jurisdictions.<sup>200</sup>

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197. See Welsh, *Mother's Laugh*, *supra* note 24, at 454.

198. See Brazil, *supra* note 24, at 132; McAdoo & Welsh, *supra* note 159, at 6–7.

199. McAdoo & Welsh, *supra* note 159, at 6–7.

200. The existing efforts on this front of ACR, an organization that sees lobbying as part of its mission, should continue and get reinforced. See ASSOC. FOR CONFLICT RESOLUTION, <http://www.acrnet.org/> (last visited Apr. 11, 2012).



Conducting more research, empirical or otherwise, will help ADR providers improve their services as well as put them in better positions to promote ADR and educate the relevant stakeholders about it.

Efforts must work within law schools to promote education reform to include ADR training. Related to such efforts, it is also important to write academic articles that promote ADR reform and implementation.

Continued efforts must be directed at gathering information about what is happening throughout the country—for example, the types of programs in place, how they were put in place, and how funding and support are being secured—and directed at effectively sharing such resources with those interested.<sup>201</sup> Similarly, designing particular pilot programs, such as an intake or triage system, and creating a way to share the results with others can be a useful resource.

Efforts, such as those RSI is currently engaged in, to identify local and national ADR organizations and initiatives and to maintain a network of information-sharing and support for jurisdictions engaged in reform efforts can further bolster and help expand the reach of ADR.

Maintaining a database of easy-to-use blueprints for convening an ADR design and ADR implementation process based on the successful experience of other jurisdictions would also help promote the expansion and reform of ADR.<sup>202</sup>

With a view to the future, some participants called for working toward redefining the judicial mission as being responsible not just for case management but also for “conflict management.”<sup>203</sup> This broader mission would include out-of-court, pre-court interventions to resolve conflict as well as in-court prevention programs such as specialized courts, drug courts, mental health courts, unified family courts, and ADR programs.

### *B. On the Local, Jurisdictional Level*

Cultivating alliances with the various stakeholders with an eye toward starting an ADR reform process is essential.

Law Schools within the jurisdiction may be able to provide some of the resources and expertise needed to help with reform efforts.

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201. See COURTADR.ORG, <http://courtadr.org> (last visited May 2, 2012).

202. See *id.*

203. See Reporter's Notes, Think Tank Five at Marquette University Law School Symposium: The Future of Court ADR: Mediation and Beyond (Sept. 23–24, 2011) (discussing what's the vision of court ADR in 2030).

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Convening conferences with a complete or partial emphasis on local ADR issues, like the one convened at Marquette that is the subject of this Report, may be another useful way to initiate a reform process.<sup>204</sup>

Jurisdictions are in various stages of ADR development and have various needs. Each jurisdiction might consider creating a committee charged with first studying and then working toward expanding and reforming the existing ADR programs within their jurisdiction. Identifying the right individuals for such a committee with diverse professional backgrounds and with clout is important. Securing funding for such a process is also crucial.

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## VIII. CONCLUSION

Those who work in the ADR field believe that ADR services are essential to the well-being of individuals, families, businesses, communities, and, by extension, our society as a whole. We must stay focused on providing the best services possible within the court-context and insist on striking the right balance between the institutional goals and the potentially distinctive contribution that ADR has to offer to those in conflict. This will require a clear vision of *why* ADR is important, an articulated vision that will define *how* ADR should be practiced, and sustained work toward supporting these visions. In order to remain true to the mission of helping parties navigate their most difficult challenges, we must ensure that the answers to *why* and *how* ADR is practiced remain in the forefront.

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204. For example, the conference at Marquette included a half-day solely focused on the future of Family ADR in Wisconsin.